No. 514.

IN THE

Supreme Court of the United States

October Term, 1944.

THOMAS HENRY ROBINSON, JR., - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THOMAS HENRY ROBINSON, JR., *Pro Se*,
Petitioner.

ROBERT E. HOGAN,
Louisville, Ky.,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUIEVILLE, KY.

SUBJECT INDEX.

ALPHABETICAL LIST OF CASES.

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT.

On December 18, 1944, this petitioner's petition for writ of certiorari to the United States Circuit Court of Appeals, Sixth Circuit, was denied. No reason was given for the denial, so petitioner is without information as to why it was denied. Petitioner, in his petition, presented to this Court more than a sufficiency of constitutional and Federal questions to warrant the granting of such a writ to him. Petitioner is at a complete loss to understand why his petition,

containing so many vital and important such questions, was denied.

As the DEATH penalty has been imposed upon this petitioner illegally, your petitioner feels thoroughly justified in *insisting* that this Court grant his petition and thereby enable him to at least have an opportunity to present his case to the Court for its determination—to present a case which is replete and top-heavy with violations of his inherent constitutional rights; a case which embodies, likewise, a multitude of Federal questions and a multiplicity of "Reasons for Granting the Writ," together with a large variety of important questions of Federal law and important questions of public importance which have not, but should be, decided by this Court. This case presents, as does no other case, more than a sufficiency of impelling reasons for this Court granting the writ. The first such reason, and one that should be all sufficient, is that petitioner has been sentenced *illegally* to DIE in the electric chair.

If this Court shall refuse to grant the writ in this case, there will be forever foreclosed to this petitioner the right or opportunity to conclusively demonstrate to the Court that, *in this case*, the DEATH PENALTY recommendation upon the part of the jury and the infliction of the DEATH PENALTY by the Court were, and are, in violation of the provisions of the Act of the Legislature, known as the Lindbergh Act, Title 18, Section 408a, U. S. C. A.

Therefore, unless this Court makes it possible, by granting the writ, for petitioner to demonstrate the illegality of the actions of the jury and of the trial court in so recommending and imposing the DEATH PENALTY, this petitioner will be put to DEATH illegally and his life, the most precious and endearing thing to man, and a thing

which it is not given to man to give or to restore will then have been illegally and ignominiously forfeited, and the shame and the disgrace for such illegal forfeiture will forever rest upon the very laps of those tribunals responsible therefor. The consideration of that question alone should be of sufficient impelling reason for this Court to grant the writ in this case.

POINT No. 1. Injuries Inflicted Must Be Permanent and Be in Evidence at Time Court Imposes Sentence, Else Death Penalty May Not Be Inflicted.

A point that has been entirely overlooked by the trial court and by the Circuit Court of Appeals is that the death penalty may not be inflicted unless it be shown that the injuries which the kidnaped victim sustained were PERMANENT, and that as a condition precedent to the jury recommending, and the Court imposing, the death penalty, it must be conclusively established that at the time of the trial and the imposition of the sentence by the court the kidnaped person is either dead or still in a harmed condition.

The intent of the Legislature becomes of assistance when attempting to determine this question. The report of the Judiciary Committee of the House of Representatives, No. 1457, to accompany S. 2252, 73rd Congress, 2d Session, amending the Federal Kidnaping Section, used the following language:

> "The third addition to this act is to permit the jury to designate the death penalty for the kidnaper. However, this penalty is not to be imposed by the Court if the kidnaped person has been liberated unharmed *prior to the imposition by the Court of the sentence.*"

An interpretation of the words of the Act itself, and of the words above quoted, are presented in this case. As will be seen above, there is a limitation upon the imposition of the death sentence.

The Act itself contains these words:

> "provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed."

A fair interpretation of the words contained in the Act and report of the Judiciary Committee, above quoted, lead to the inescapable conclusion that the death penalty may not be imposed by the Court if at the time of the trial and the imposition of the sentence the kidnaped victim is *then* free from harm.

If that be the correct interpretation of the words of the statute itself and of the report of the Judiciary Committee, which petitioner vigorously asserts is a correct interpretation of the statute and of the intention of the Legislature, then this petitioner has been illegally condemned to DIE, for, in the case of petitioner, his alleged victim, Mrs. Stoll, was in court and testified for the Government as its chief prosecuting witness. Her testimony, direct and cross, is to be found on pages 518 to 589 of the Transcript of Record. Neither she nor any other witness claimed, intimated, or maintained either that she had been permanently injured as a result of the alleged kidnaping, or that at the time of the trial and imposition of the sentence she was then suffering from any injury, or result of any injury claimed to have been inflicted upon her by petitioner. The death penalty which resulted, and which will be carried out, unless this Court intervenes, goes way beyond what was intended by Congress and is illegal.

Petitioner offered Instructions 7 and 8 (p. 166, Tr. Rec.), to the effect that the death penalty might not be recommended or imposed because of a complete lack of evidence as to the harmed condition of the alleged victim at the time of the trial and imposition of sentence. That instruction was not given. It was petitioner's contention then, and now, that the death penalty should in no event have been recommended or allowed to be imposed because of a total absence of evidence showing the alleged victim to be in a harmed condition at the time of the trial, and because of a total absence of any evidence showing that any *permanent* injuries were ever inflicted upon the alleged kidnaped person. This presents to this Court a most vital and important question, involving not only the freedom, but the very life of this petitioner.

There has been but one case, that of United States v. Parker, 19 F. Supp. 450, 103 F. 2d 857, 3d Circuit, in which the harmed or unharmed question was determined. The opinion in the Federal Reporter, while reciting that it agreed with the court below (19 F. Supp. 450), is in reality in direct disagreement with the opinion in the Federal Supplement. The result is that there is a vast inconsistency in the only opinions on the subject under discussion. That should be sufficient justification and reason for this Court taking hold of this case and straightening out what appears to be a most complex problem.

If not clarified by a ruling from this Court, this petitioner will be required to illegally give his life as an unwarranted penalty for an offense which does not, in this case, warrant the infliction of the extreme penalty.

In the Parker case, Ellis Parker, with others, was indicted for violation of Title 18, U. S. C. A. 408 and 408c. It was necessary, for venue purposes, to determine first

whether the offense charged was such as enabled the death penalty to be inflicted. The district court was uncertain of the meaning of the phrase:

> "* * * provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnapped person has been liberated unharmed."

The opinion, found in 19 F. Supp. 450, contains these words:

> "The significant words are, of course, 'liberated unharmed,' a past participle and an adjective with the negative prefix 'un.' The phrase is capable of two grammatical interpretations. The harm may relate to the period of captivity and it may relate to the moment of release or liberation, or, in other words, Congress may mean to punish with death (the jury concurring) kidnappers who have harmed their victim at any time—or, on the other hand, Congress may mean to punish with death (the jury concurring) kidnappers, who, AT THE TIME OF THE IMPOSITION OF SENTENCE, ARE UNABLE TO PRODUCE AN UNHARMED VICTIM. * * *
>
> "The first inducement is to conduct the kidnapping with, shall we say, the minimum of violence.
>
> "The second inducement is to refrain from action leading either to PERMANENT INJURY, to PERMANENT CAPTIVITY, or to DEATH. * * *
>
> "We declare, therefore, for crediting Congress with intending the second inducement and preferring a CURED and LIVE victim to a dead or permanently injured one * * *."

The district court in that case adopted the second inducement, the cured and live victim theory, and held that Congress intended that the second inducement should apply and that Congress preferred a CURED and *live* victim to a dead or permanently injured one.

Despite such a holding, and although the opinion of the Third Circuit in the Federal Reporter, already referred to, states that the appellate concurred with the lower court, yet a reading of the two opinions discloses a wide divergency in the two upon the most vital question, because the lower court in the Parker case is committed to the view that if the defendant is able to produce, or there is produced, at the time of trial and imposition of sentence either a CURED or LIVE victim, the death penalty may not be imposed. Assuming, for argument's sake, that Mrs. Stoll had been harmed or injured during the period of captivity, yet she was *alive* and *cured*, as distinguished from *dead* or *permanently injured*, at the time of the trial of this petitioner and the imposition of sentence upon him. Applying that state of facts to the instant case, and applying the ruling of the district court in the Parker case to that set of facts and applying the intention of Congress as related in that opinion, undoubtedly the death sentence imposed upon petitioner was wholly unwarranted and illegal.

The Circuit Court of Appeals' opinion in the Federal Reporter which interprets the lower court's opinion as meaning that the physical condition of the victim at the time of release governs, is nevertheless in direct conflict with the lower court's opinion with which it purports to agree, because the lower court ruled that the physical condition at the time of imposition of sentence is determinative of whether the death penalty may, or may not be, recommended and inflicted.

The result of the inconsistency in the two opinions is that this most important and vital question is left in a very muchly muddled and unsolved state, and it behooves this Court to straighten out the question before this petitioner is made to be the unwilling sacrifice of a jumbled-up and

uncertain piece of legislation. Petitioner most vigorously insists that Congress intended that he should not be put to death when the facts undeniably show that the alleged victim of the kidnaping alleged to have been committed by him was, at the time of the trial and imposition of sentence, alive, cured and in a perfectly sound physical condition. This Court should relish an opportunity to save the life of petitioner, under the circumstances herein presented and not stand idly by and suffer petitioner's life to be illegally taken. That is a province which this Court should readily, and with all willingness, exercise. The Court is earnestly implored to take this case and give this petitioner at least a CHANCE to show that he has a right to continue living and that the death sentence was illegally imposed upon him. The facts of this case demand that he should be given such opportunity.

POINT No. 2. Misconduct of the Prosecuting Attorney Prejudicial.

On pages 45 to 54 of petitioner's petition and brief it is asserted that the Court erred in not holding that the misconduct of the Prosecuting Attorney was prejudicial. Since then the Court of Appeals of Kentucky, on October 17, 1944, in the case of *Edwards* v. *Commonwealth of Kentucky*, Ky. ; 182 S. W. 2d 948, has rendered an opinion and reversed a case *solely* on the ground of improper argument to the jury by the prosecuting attorney.

Edwards and one Harvey, were charged with murdering a man in Jefferson County, Kentucky. By way of a little history of the case and of the parties, Edwards was in the Jefferson County, Kentucky, jail, and in the same cell block, with this petitioner. Both he and petitioner had

been so unfortunate as to have had imposed upon them the death sentence, and both were in jail at the same time pending their respective appeals. The improper argument to the jury in the Edwards case was held sufficient to justify a reversal. The improper argument in the case of petitioner, much more flagrant than in the Edwards case, should be sufficient to warrant this Court taking this case by granting this petitioner the writ so earnestly sought. The Kentucky Court had this to say:

> "But one statement in the argument for the Commonwealth was so palpably unjustified by the evidence, and of such a character, as to have rendered it highly prejudicial to the substantial rights of appellant, *considering the fact the death sentence was imposed.* Harvey, who was Edwards' accomplice, did not testify, and no statement by him was introduced in evidence • • •. But the Commonwealth's Attorney knew that Harvey had made a confession, and knew that the confession related that he (Harvey) was the one who struck the blow and tied the knot that caused the death of Mr. Heitlauf. • • •
>
> "With these facts and precepts in mind, we will consider the statement made by the Assistant Commonwealth's Attorney, which was:
>
> > 'It makes no difference in this case who did the killing. I don't know. He (meaning Edwards) says he didn't do it. Harvey says he didn't do it.'
>
> "Since Harvey did not testify, and no statement of his was presented in evidence, any reference to a statement made by him would have been improper, even if true. How much more reprehensible, then, was counsel's conduct in falsely quoting to the prejudice of the accused. (Then follows a reference and quotation to the Berger case, 55 S. Ct. 629.)
>
> "Of course, the attorney representing the Commonwealth is related to the Commonwealth in the same

degree that the United States Attorney is related to the Federal Government * * *.

"It especially is incumbent upon the attorney representing the Commonwealth to fully represent the evidence in its true light; because any statement uttered by him in a criminal case is more or less strengthened by his official position, since all men know it is his duty not only to endeavor to convict the guilty, but likewise to effect the acquittal of the innocent. * * * It is true that no objection at the time was made to the statement; but, where the defendant's life is at stake, technical rules of procedure must give way to the more lofty aim that justice may be done. As said by the Supreme Court, in Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682:

> 'The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.'

"*It is far more important to society and constitutional government that the accused be accorded a fair and impartial trial than that he be required to forfeit his life in expiation of his crime, no matter how guilty the facts fairly adduced might have proven him to have been.*

"For the reasons recited above, although no objection was made to the statement complained of, it was so highly prejudicial to the rights of the accused, considering the penalty involved, that this Court will take notice of the error and direct a reversal of the judgment, in order that a fair and impartial trial may be had."

As will be seen from the quoted objectionable portion of the Assistant Commonwealth Attorney's argument, but very, very few words were said which were claimed to have been prejudicially objectionable. In the instant case, on pages 47 and 48 of petitioner's petition for writ and brief

in support thereof, are set forth many statements which the District Attorney made, some of which were not only prejudicial, but which were not even supported by any evidence. Others were highly inflammatory and passionately made. In this case, as in the Edwards case, the death penalty has been imposed. It is far more important that petitioner be afforded a fair trial than that he be required to forfeit his life in expiation of the crime charged against him, no matter how guilty he may have been made to appear. Such statements as were made by the District Attorney had such an effect on the jury as to cause them to recommend the death penalty.

That death penalty will stand and be carried out unless this Court grant his petition and at least afford him an opportunity to be heard and have his case, upon the merits, passed upon. It would be irony of fate, nothing short of tragedy, for Edwards, the cell-block mate of petitioner who had been charged with murder, to be granted a new trial and for this petitioner, who did not take a life nor was he implicated in the taking of a human life, to be made to pay the extreme penalty when the improper argument in petitioner's case was exceedingly much more flagrant and passionate than in the Kentucky case of Edwards. This Court is earnestly implored to give to this case the earnest and serious consideration it so rightfully deserves, and to withdraw the order heretofore entered denying the writ; to grant to petitioner the relief prayed for in his petition for writ of certiorari, heretofore filed.

Respectfully submitted,

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Petitioner.

ROBERT E. HOGAN,
Louisville, Ky.,
Of Counsel.

Petitioner hereby certifies that in his judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

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